

HOOD RIVER TRAILS, INC.

IBLA 97-328

Decided December 10, 1998

Appeal from a decision of the Deschutes Resource Area Manager, Bureau of Land Management, denying a request to reconsider a moratorium on the issuance of new commercial floatboating permits for the Lower Deschutes Wild and Scenic River and denying the transfer of permit 056-R-011.

Affirmed.

1. Bureau of Land Management--Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

According to BLM's Special Recreation Permit Policy, when a permittee desires to transfer its permit privileges, it must notify BLM in writing. BLM must be provided with adequate documentation showing that a bona fide business transfer or sale is intended. The transfer must include a substantial portion of the equipment and tangible assets needed to conduct a business. Any attempted transfer or sale of authorized use only is not allowed. BLM properly denies the transfer of the permit of a flyfishing guide to an adventure outfitter when the record clearly shows the parties contemplated the transfer of little more than the authorized use.

APPEARANCES: Marc Geller, President, Hood River Trails, Inc., Hood River, Oregon, for appellant; Eric W. Nagle, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Hood River Trails, Inc. (Hood River), has appealed from a February 19, 1997, decision issued by the Deschutes Resource Area Manager, Bureau of Land Management (BLM), denying a request to reconsider a moratorium on the issuance of new commercial floatboating permits on the Lower Deschutes River and denying a request for transfer of permit 056-R-011.

The Lower Deschutes River is a 100-mile stretch of the Deschutes River between the Pelton Reregulating Dam and its confluence with the Columbia River. In 1970, the State of Oregon designated the Deschutes River as a scenic waterway, pursuant to Or. Rev. Stat. §§ 390.805-390.925 (1992). In October 1988, Congress designated the Lower Deschutes River as a recreational river, pursuant to section 102 of the Omnibus Oregon Wild and Scenic Rivers Act, 16 U.S.C. § 1274(a)(73)(E) (1994). That action by Congress resulted in the river becoming part of the national wild and scenic rivers system and subject to the Wild and Scenic Rivers Act, as amended, 16 U.S.C. §§ 1271-1287 (1994).

Following designation, BLM began, in cooperation with other Federal, state, local, and tribal agencies, to develop a comprehensive management plan for the river. That effort culminated with the issuance, in February 1993, of the Record of Decision for the Lower Deschutes River Management Plan (LDRMP). 1/ The LDRMP did not propose a moratorium on new commercial permits, but it did set targets for overall use during the high season (May 15 to September 15) based on 1990 use levels. (LDRMP at 44-48.) Analysis of boating statistics for 1993-95 showed that "seasonal use levels generally fell below the 1990 target for most segments of the river, but daily use levels continued to exceed the targets on a regular basis." (Answer at 4.)

BLM remained concerned about use levels on the river, and, at the Lower Deschutes River permittees' meeting on November 23, 1996, it discussed a proposed moratorium on new commercial permits. "Comments at the meeting indicated that the lack of a commercial permit moratorium, which some permittees thought was agreed to by BLM, contributed to a lack of support for voluntary reductions [in use by commercial permittees]." (Answer, Ex. 8 at 4, "Permittee Meeting Summary.")

On December 10, 1996, the Deschutes Resource Area Manager issued a decision stating: "A moratorium on the issuance of new commercial floatboating permits for the Lower Deschutes Wild and Scenic River will become effective on January 1, 1997 * * *." 2/ (Answer, Ex. 10.) He indicated that nonpermit measures would be intensified in order to reduce daily use on peak days and "avoid implementation of a permit system." Id. He further announced that, during the moratorium, applications for new commercial boating permits would not be accepted, but that applications to

1/ For management planning purposes, the LDRMP divided the river into four sequential segments: Segment 1, 41 miles, from the Pelton Reregulating Dam to the Deschutes Club's locked gate; segment 2, 15 miles, from the locked gate to Sherars Falls; segment 3, 21 miles, from Sherars Falls to Macks Canyon; and segment 4, 23 miles, from Macks Canyon to the confluence of the Lower Deschutes River with the Columbia River. (LDRMP at 1-2.)

2/ Although styled "ADMINISTRATIVE DECISION," the Area Manager did not include therein an appeals paragraph notifying recipients of the right to appeal his "decision" to this Board.

transfer existing permits would be entertained. He attached to his decision a copy of the "existing transfer policy." Id. According to that policy statement, entitled "Transfer of Permit Privileges," approval of permits is within the discretion of the authorized officer. However, according to that policy statement, the authorized officer is required to examine eight items in determining whether to approve the transfer. The first of those items is: "Adequate documentation that a bona fide business transfer or sale is intended. The transfer or sale must include a substantial portion of the equipment and other tangible assets needed to conduct a business. Any transfer of authorized use alone will not be permitted." Id.

On January 14, 1997, BLM received a letter from flyfishing guide Jim Schollmeyer stating that he intended to sell his guide business and transfer his permit to Marc Geller of Hood River. Attached to the letter was an agreement, dated January 9, 1997, and executed by Schollmeyer and Geller, by which Hood River offered to purchase Schollmeyer's business, "limited to your existing Mailing List and Deschutes River Outfitter-Guide Permit, for \$500." The agreement further stated that Hood River intended to use the permit for whitewater rafting and that it would agree to a restriction limiting use to Mondays-Thursdays.

According to Geller, he was orally informed by a BLM employee that BLM would not approve the transfer from Schollmeyer. Thereafter, in a letter to BLM dated January 29, 1997, Geller objected to the moratorium and to the proposed denial of the transfer. He stated that the moratorium was "improperly drawn" because it denied access even to outfitters who only intended to use the river on weekdays. He asserted that the proposed transfer satisfied seven of the eight items in the transfer policy and that denial should not be based on the lack of the sale of equipment.

On February 19, 1997, the Area Manager responded to Geller by issuing a decision denying reconsideration of the moratorium and denying the transfer. He stated that while he appreciated Geller's offer to operate only on weekdays, "our ability to absorb additional use at all is very limited. Public access to guide and outfitter services on the river in 1997 is expected to be fully adequate with well over 100 permittees." Regarding the transfer of Schollmeyer's permit, the Area Manager stated that Schollmeyer had informed BLM that he did not intend to continue his business operation and that, based on that notification, "his permit will be terminated and his file closed. With that action there is no permit to transfer." The Area Manager added that the guidelines for transfer were intended to insure that any transfer supported a bona fide business sale, not a purchase of permit privileges to use public resources. He stated that it would be difficult to justify a permit transfer based on a comparison of the business operations of Hood River and Schollmeyer. 3/ Geller filed a timely appeal on behalf of Hood River.

3/ Hood River specializes in week-long multi-adventure trips of up to 13 individuals, which include a day of whitewater rafting. Although Hood River did not hold a commercial permit on the Lower Deschutes River at the time of the appeal, it apparently offered whitewater rafting opportunities

On appeal, Geller raises two arguments. First, he argues that the moratorium is improper because it prohibits issuance of all new commercial permits, even for weekday use. Such a moratorium, Geller argues, is overly restrictive because overcrowding only occurs on peak weekends. Next, Geller asserts that transfer denial is also improper. He contends that BLM avoided evaluation of the transfer by relying on a letter from Schollmeyer stating that he had decided to retire. Geller argues that the proposed transfer satisfied seven of the eight items listed in the transfer and that BLM has too much discretion in deciding whether to allow transfers.

In response, BLM argues that Geller's challenge to the moratorium is time-barred because that moratorium was originally announced in a December 10, 1996, decision. BLM states that the record shows that Geller received a copy of that decision on January 29, 1997, and failed to appeal that decision within 30 days of that date. We reject this argument. Under that theory, Geller's objection to the moratorium decision, received by BLM on January 29, 1997, should have been forwarded to this Board as a timely appeal of the December 10, 1996, decision. BLM did not do so, however. Instead, it entertained that objection as a request to reconsider its December 10 decision. Accordingly, Geller is not precluded, based on BLM's theory, from raising the issue of the moratorium in this appeal.

Special recreation permits are issued under the authority granted to the Secretary of the Interior by the Land and Water Conservation Fund Act, 16 U.S.C. § 4601-6a(c) (1994), which provides: "Special recreation permits for uses such as group activities, recreation events, motorized recreation vehicles, and other specialized recreation uses may be issued in accordance with procedures and at fees established by the agency involved." See also 43 C.F.R. § 8372.0-3; Special Recreation Permit Policy (Permit Policy), 49 Fed. Reg. 5300 (Feb. 10, 1984). 4/ BLM implemented this and other statutory provisions, including sections 302(b) and 304 of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §§ 1732(b), 1734 (1994), by promulgating the regulations in 43 C.F.R. Subpart 8372.

We find the moratorium imposed by the Area Manager to be a proper exercise of his discretion under the regulations and the Permit Policy. The Permit Policy provides that "[w]hen an area's desired use level has been reached, no additional permits will be issued." 49 Fed. Reg. 5304 (Feb. 10, 1984.)

fn. 3 (continued)

on the river by subcontracting with another individual holding a permit for commercial use on the river. On the other hand, Schollmeyer's business consisted of guiding one to three individuals on flyfishing trips on the river.

4/ The "Transfer of Permit Privileges" statement, which accompanied the Area Manager's Dec. 10, 1996, decision, is derived from and reflects the language of the Permit Policy.

In this case, BLM determined that indirect and voluntary measures had not resulted in the desired use modification. The Area Manager imposed the moratorium to control use pending a final decision on the implementation of a limited-entry system for all river users. See Answer, Ex. 10. Geller asserts that the major concern is with weekend river use, and that the moratorium should not apply to Hood River because it seeks only weekday use.

BLM counters that issuing additional permits for weekday use would be inconsistent with its objective of persuading current permit holders to voluntarily redistribute their weekend use to weekdays. Moreover, Geller's point that denying Hood River a permit will not reduce overall seasonal use because Hood River will contract with an existing permit holder is not well-taken. Contracting with a current permit holder will not increase the overall use of the river, and, in fact, it could result in a shift of use from weekends to weekdays.

BLM's principal basis for denial of the permit was the lack of a permit. The case record shows that BLM initially received a letter from Schollmeyer on October 17, 1996, stating that he intended to sell his guide service and transfer his permit to Dick Crossley "for the cost of my guide equipment--rods and reels for the sum of \$400.00." On November 21, 1996, BLM responded to Schollmeyer informing him that the transfer could go forward if certain conditions were met. There is nothing further in the case file regarding that proposed transfer.

The next document in the file is a two sentence memorandum dated January 8, 1997, from "Thomas X Mottl" to "GNerseth," on the subject "Jim Schomeyer[sic]" stating: "Will not renew his permit for 1997. Asked him to send a letter." The letter sent by Schollmeyer and received by BLM on January 14, 1997, stated his intent to sell his guide service and transfer his permit to Hood River. Attached to the letter was their January 9, 1997, agreement to do so. Thus, the written notification received by BLM stated that Schollmeyer intended to sell his business and transfer his permit. On February 13, 1997, BLM received a "BLM Commercial Use Permit Statement of Ownership" form from Schollmeyer on which he noted: "I am not renewing my permit in 1997."

The Area Manager concluded in his decision that "[w]ith Mr. Schollmeyer's notification, his permit will be terminated and his file will be closed. With that action, there is no permit to transfer." We find Schollmeyer's "notification" does not support such a conclusion. In January 1997, Schollmeyer notified BLM, in writing, that he intended to sell his business and transfer his permit. A month later, he notified BLM, in writing, that he was not renewing his permit. Those two notifications are not necessarily inconsistent. If Schollmeyer were transferring his permit, there would be no need for him to renew it. Schollmeyer's February 13 "notification" was not a proper basis for denial of the transfer and, were that the only reason stated for denying a transfer, we would set aside the Area Manager's denial. However, the Area Manager also relied

on the fact that there was no bona fide transfer of a business contemplated by Schollmeyer and Hood River as an alternative basis for denial. We find that this ground supports denial of the proposed transfer.

[1] The case record confirms BLM's assertion that the parties did not contemplate a bona fide transfer of Schollmeyer's fishing guide business. One need only examine the agreement between Schollmeyer and Hood River to see that Hood River intended to purchase only Schollmeyer's mailing list and the permit. No mention is made of the sale of equipment or other tangible business assets. While a business mailing list clearly is a business asset, Schollmeyer's mailing list would appear to have little value to Hood River because there is no evidence that Hood River intended to offer fly fishing services. It is clear that the purpose of the sale was for Hood River to secure Schollmeyer's authorized use on the river.

The Permit Policy provides that the "transfer or sale must include a substantial portion of the equipment and other tangible assets needed to conduct a business." (Answer, Ex. 10 at 2; see 49 Fed. Reg. 5305 (Feb. 10, 1984).) It precludes the transfer of authorized use only. See David Farley, Inc., 90 IBLA 112, 122-23 (1985).

Although Geller asserts that the transfer policy is invalid because of the "improper" discretion granted to the authorized officer (Statement of Reasons (SOR) at 5), the Permit Policy actually limits the discretion of the authorized officer in approving permit transfers. The preamble to the Permit Policy states: "Each transfer of permit privileges must follow the specific procedure outlined in the final policy. Sale of authorized use only is specifically prohibited." 49 Fed. Reg. at 5303. Geller complains that "[w]hile the proposed permit transfer appears to satisfy items 2-8 [of the transfer policy], the BLM's denial was hung solely on the portion of item 1 relating to sale of equipment." (SOR at 5.) Item 1, however, imposed an absolute restriction on transfers, i.e., there could be no transfer of authorized use alone. See Answer, Ex. 10. Thus, in this case the Area Manager did not have any discretion. Upon determining that the proposed transfer did not involve the bona fide transfer of a business operation, he was required to deny the proposed transfer.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

concur:

James L. Burski
Administrative Judge